IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1766

JAMES A. LINCOLN, ALBERT LINCOLN, AND ROSA L. SUMPTER, *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioners James A. Lincoln, Albert Lincoln, and Rosa L. Sumpter respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on April 12, 1978.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears as an appendix hereto. Memorandum opinions and orders of the District Court, were entered July 25, 1975 and September 23, 1975. The judgment of the Court of Appeals for the District of Columbia was entered April 12, 1978. It appears in the appendix.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

The Court of Appeals for the District of Columbia Circuit has held that court-authorized wire interceptions of petitioners, upon which their gambling convictions are based, were undertaken in full conformance with 18 U.S.C. § 2510 *et seq.* The questions presented are:

1. Where petitioners identified nine prior gambling interceptions that were judicially declared unlawful and on which there was a "substantial possibility" that they were overheard and that may have tainted the interceptions upon which their own convictions were based, was the trial court correct in ruling that petitioners had demonstrated no standing to raise the illegality of the nine unlawful taps and in refusing to allow examination of materials from these unlawful interceptions on the issue of standing?

2. Was the Government's perfunctory boilerplate statement on investigative need at the conclusion of its wire interception applications sufficient compliance with 18 U.S.C. § 2518(1)(c).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 2510(11) provides:

> (11) "aggrieved person" means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.

18 U.S.C. § 2518(1)(c) provides:

> (1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information . . .
>
> > (c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

18 U.S.C. § 2518(10)(a) provides:

> (10)(a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—
>
> > (i) the communication was unlawfully intercepted;
> >
> > (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
> >
> > (iii) the interception was not made in conformity with the order of authorization or approval.
>
> Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or

oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

STATEMENT OF THE CASE

By indictment filed January 31, 1975, petitioner Rosa L. Sumpter was charged along with other persons with various District of Columbia and federal gambling offenses.[1] By a second indictment filed April 4, 1975, petitioners James A. Lincoln and Albert Lincoln, and other persons, were charged with similar gambling offenses.[2] Both cases arose from the same series of court-ordered wire interceptions conducted during the summer of 1974 and both were assigned to United States District Court Judge Thomas A. Flannery.

A joint suppression hearing was held on June 19 and 20, 1975. On July 25, 1975, the trial court entered a memorandum opinion and order covering both cases in which all motions to suppress the wire interceptions

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[1] Her indictment, in *United States* v. *Sumpter, et al.*, Criminal No. 75-82, charged the typical array of lottery offenses; violations of 18 U.S.C. §§ 1952 and 1955 (interstate transportation in aid of unlawful activity and conducting an illegal gambling business); and violations of 22 D.C. Code §§ 1501, 1502 and 1505 (operating a lottery, possession of lottery slips and maintaining a gambling premises).

[2] This indictment, in *United States* v. *Lincoln, et al.*, Criminal No. 75-227, was akin in its allegations to the *Sumpter* indictment except that it charged no violation of 22 D.C. Code §§ 1502 or 1505, the local statute's gambling misdemeanors.

were denied, with the exception of those motions that alleged that 1974 interceptions were been unlawfully tainted by earlier illegal taps. On September 5, 1975, Judge Flannery held a hearing on this aspect of petitioners' challenge to the legality of the interceptions. On September 23, 1975, again by memorandum opinion and order entered in both cases, the trial court denied petitioners' motion for suppression and for other relief.

Each petitioner was thereafter convicted upon trial on stipulated facts, the Sumpter proceeding occurring January 26, 1976 and the Lincoln proceedings occurring March 12, 1976. Each petitioner noted a timely appeal. The cases were consolidated by the Court of Appeals on August 26, 1976.

By their appeal, petitioners sought to raise various issues relating to the manner by which evidence supporting their convictions was obtained. That evidence was essentially wire interception evidence. It was ostensibly secured without reliance on prior illegal gambling interceptions and in conformance with the provisions of 18 U.S.C. § 2510 *et seq*. The degree of that conformance and the extent to which there may have inhered tainted evidence in the interception applications underlying the tap from which petitioners were convicted formed the core of their appellate challenge. On April 12, 1978, a panel of the United States Court of Appeals for the District of Columbia Circuit rejected that challenge and upheld the manner by which the Government secured the interceptions in this case.

A. The Investigation of Petitioners

Petitioners and their colleagues were said to have been investigative targets of federal authorities for a number of years.[3] In 1971 and 1972, the authorities were able to obtain the cooperation of four informants who, together with other previously cooperating sources, provided information about the outlines of an alleged lottery in which petitioners and others participated.[4] Authorities then began surveillance of an address at 5314 7th Street, N.W., in November 1973, and continued it sporadically through May 1974. The surveillances seemed to corroborate informant allegations that the 7th Street address was the locus of lottery activity.[5]

On this basis, the Government on June 5, 1974, obtained authorization from United States District Court Judge George L. Hart to install a pen register device upon telephones 291-4831 and 882-4296, located at 5314 7th Street, N.W.[6] These pen register devices operated at certain specified times during several days in June and early July.

Based on the results of these pen registers in combination with informant allegations and surveillances, the

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[3] Affidavit for wire interception of 7234 Landover Road, Landover, Maryland, August 17, 1974, at 60. (This affidavit and all other relevant affidavits may be found in the joint appendix filed with the Court of Appeals.) The affidavit suggests that the investigation had been going on for five years, although it is unclear the degree to which petitioners were direct targets.

[4] Landover Affidavit at 17-22.

[5] *Id.* at 23-31.

[6] Hereafter the 7th Street pen register.

Government on July 26, 1974, obtained authorization from Judge Hart to install a court-ordered wire interception on the 7th Street telephones.[7] That interception operated on four days during the first half of August.

On August 17, 1974, the Government obtained from United States District Court Judge Joseph H. Young of the District of Maryland a court-ordered wire interception of communications over telephones 322-7404 and 322-7416, both located at 7234 Landover Road, Apartment E, Landover, Maryland.[8] This tap operated for six days during August 1974.

On September 11, 1974, and on the days that followed, search warrants were issued in the District of Columbia and Maryland for premises revealed by the interceptions to be involved in lottery activities. Various physical seizures were made from petitioners and other persons. These seizures, in combination with the intercepted communications, formed the core of the Government's evidence on which subsequent indictments were based.

B. Petitioners' Suppression Contentions

By extensively briefed and documented pleadings, petitioners raised a variety of suppression issues with the trial court. They pressed two contentions in particular: the information on which the 1974 pen register and taps were based was the taint of one or more of several earlier unlawful wire interceptions; and the Government's wire-interception applications were deficient because they failed adequately to set forth a full and com-

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[7] Hereafter the 7th Street tap.

[8] Hereafter the Landover tap.

plete statement as to why normal investigative techniques were insufficient.

1. THE ALLEGATION OF TAINT: NINE UNLAWFUL GAMBLING INTERCEPTIONS, 1970-1973

Petitioners contended that the process by which the Government accumulated the information on which its 1974 pen registers and taps were based included reliance on one or more of nine unlawful wire interceptions occurring between October 1970, and March 1973. It was petitioners' thesis that these unlawful interceptions provided the Government with information about the 7th Street address and with the identity and cooperation of the four informants whose information constituted a significant portion of the original pen register basis. Petitioners identified the unlawful gambling interceptions that gave rise to this taint with great particularity.[11] They were:

a. *The Illegal N Street Interceptions: October and November 1970*

Address: 1425 N Street, N.W., Washington, D.C.

Telephone Numbers: 332-4297 and 234-9598

Date of Authorization: October 29, 1970, extended November 13, 1970

Authorizing Court: United States District Court for the District of Columbia

Investigative Agency: FBI

Investigative Purpose: Alleged local gambling activity

Duration of Tap: October and November 1970

Court Action: *Wire interception declared illegal.* All communications, physical evidence and other fruits

suppressed by the United States District Court for the District of Columbia and affirmed by the United States Court of Appeals for the District of Columbia Circuit on March 30, 1973.

b. *The Illegal Wisconsin Avenue Interceptions: November 1970*

Address: 3200 Wisconsin Avenue, Bethesda, Maryland

Telephone Numbers: 652-1277 and 652-1278

Date of Authorization: November 25, 1970

Authorizing Court: United States District Court for the District of Maryland

Investigative Agency: FBI

Investigative Purpose: Alleged local gambling activity

Duration of Tap: November and December 1970

Court Action: *Wire interception declared illegal.* All communications, physical evidence and other fruits suppressed by the United States District Court for the District of Columbia on March 29, 1972 and affirmed by the United States Court of Appeals for the District of Columbia Circuit on March 30, 1973.

c. *The Illegal Devonshire Place Interceptions: December 1970*

Address: 2737 Devonshire Place, N.W., Washington, D.C.

Telephone Number: 387-2633

Date of Authorization: December 10, 1970

Authorizing Court: United States District Court for the District of Columbia

Investigative Agency: FBI

Investigative Purpose: Alleged local gambling activity

Duration of Tap: December 1970

Court Action: *Wire interception declared illegal.* All communications, physical evidence and other fruits suppressed by the United States District Court for the District of Columbia on March 29, 1972 and affirmed by the United States Court of Appeals for the District of Columbia Circuit on March 30, 1973.

d. The Illegal Good Hope Road Interceptions: May 1970

Address: 2330 Good Hope Road, S.E., Washington, D.C., Apartment 712

Telephone numbers: 583-9489 and 583-9499

Date of Authorization: April 30, 1971

Authorizing Court: United States District Court for the District of Columbia

Investigative Agency: FBI

Investigative Purpose: Alleged local gambling activity

Duration of Tap: May 1, 1971 through May 15, 1971; May 19, 1971 through May 27, 1971

Court Action: *Wire interception declared illegal.* All communications, physical evidence and other fruits suppressed.

e. The Illegal Prince Georges County Interceptions: Summer 1971

Address: 5211 25th Avenue, Hillcrest Heights, Maryland

Telephone Numbers: (?) (Albert Lincoln subscriber)

Date of Authorization: Summer 1971

Authorizing Court: Prince Georges County District Court

Investigative Agency: Prince Georges County Police Department

Investigative Purpose: Alleged local gambling activity

Duration of Tap: At least several days

Court Action: *Wire interception declared illegal.* All communications, physical evidence and other fruits suppressed by Judge James F. Couch, District Court, Fifth Judicial District of Maryland, on December 17, 1971.

f. The Ilegal Second Street Interceptions: November and December 1972

Address: 220 Second Street, S.E., Washington, D.C. Apartment 102

Telephone Number: 544-3653

Date of Authorization: November 15, 1972, extended on December 7, 1972

Authorizing Court: Superior Court of the District of Columbia

Investigative Agency: FBI

Investigative Purpose: Alleged local gambling activity

Duration of Tap: A maximum of thirty-two days (For a period of up to twenty days following November 15, 1972 and for a period of up to twelve days following December 7, 1972.)

Court Action: *Wire interception declared illegal.* All communications, physical evidence and other fruits suppressed by United States District Court Judge June L. Green on September 12, 1973. Suppression

affirmed by United States Court of Appeals for the District of Columbia Circuit on June 28, 1974.

g. The Illegal 12th Street Interceptions: November and December 1972

Address: 3725 12th Street, S.E., Washington, D.C. Apartment 208A

Telephone: 635-2487

Date of Authorization: November 29, 1972

Authorizing Court: Superior Court of the District of Columbia

Investigative Agency: FBI

Investigative Purpose: Alleged local gambling activity

Duration of Tap: A maximum of twenty days

Court Action: *Wire interception declared illegal.* All communications, physical evidence and other fruits suppressed by United States District Court Judge June L. Green on September 12, 1973. Suppression affirmed by United States Court of Appeals for the District of Columbia Circuit on June 28, 1974.

h. The Illegal 42nd Street Interceptions: January 1973

Address: 17 42nd Street, N.E., Washington, D.C. Apartment 3

Telephone: 397-7996

Date of Authorization: January 24, 1973

Authorizing Court: United States District Court for the District of Columbia

Investigative Agency: FBI

Investigative Purpose: Alleged local gambling activity

Duration of Tap: Approximately seven days

Court Action: *Wire interception declared illegal.* All communications, physical evidence and other fruits suppressed by United States District Court Judge June L. Green on September 12, 1973. Suppression affirmed by United States Court of Appeals for the District of Columbia Circuit on June 28, 1974.

i. The Illegal 16th Street Interceptions: March 1973

Address: 1232 16th Street, N.E., Washington, D.C.

Telephone Number: (?)

Date of Authorization: March 27, 1973

Authorizing Court: Superior Court of the District of Columbia

Investigative Agency: FBI

Investigative Purpose: Alleged local gambling activity

Duration of Tap: Approximately twenty days

Court Action: *Wire interception declared illegal* as to defendant Aaron Moore. All communications, physical evidence and other fruits suppressed by the United States Court of Appeals for the District of Columbia Circuit on May 27, 1975.

Petitioners sought a full evidentiary hearing on the scope of taint created by these prior illegal investigative activities.

2. The Exhaustion of Normal Investigative Means

It was petitioners' second major contention that the wire-interception applications filed by the Government failed to offer any full and complete statement as to whether or not other investigative procedures had been tried and found wanting. The 7th Street tap application contained a three-sentence conclusory assertion at pages 73 and 74 under the heading "Summary and Prayer." The Landover application contained virtually the same brief assertions at page 60, also under the heading "Summary and Prayer." Petitioners contended to the trial court that these brief conclusions did not constitute "(a) full and complete statement as to whether or not other investigative procedures have been tried and failed or why they appear to be unlikely to succeed if tried or to be too dangerous," as required by 18 U.S.C. 2518(1)(c).

C. Suppression Proceedings

On June 19 and June 20, 1975, the trial court conducted hearings on petitioners' suppression contentions. Following argument on those of petitioners' contentions that were of a purely legal character,[9] petitioners sought to present evidence in support of their claims of taint caused by the prior illegal interceptions. After argument on the matter (Tr. 49-70), the trial court ruled that evidence might be taken on the taint nexus and that the burden would be petitioners (Tr.

[9] Those arguments concerned the absence of probable cause for the pen register application, the absence of investigative need for the two wiretaps, and the achievement of investigative objectives prior to the installation of the Landover tap. They may be found at Tr. 11-48.

77). As a precautionary measure, over defense objection (Tr. 66,) the trial court excluded all individual defendants from the courtroom and allowed the suppression hearing to go forward only in the presence of counsel for both sides and court personnel (Tr. 77).

The Government called Agent Thomas E. Marsh of the Federal Bureau of Investigation, apparently the principal author of the various applications (Tr. 79). Agent Marsh testified that he had talked with various other agents responsible for the development of key informants and informant information and had been told by them how this material had been uncovered. Agent Marsh testified that he was satisfied it had not been the result of an unlawful wire interception (Tr. 81, 82).

On cross-examination, a somewhat different picture developed. Agent Marsh testified that he had never discussed with any fellow agent the nine unlawful gambling interceptions focused on by the defense (Tr. 96) and that he had no idea what contract, if any, his fellow agents had had with these interceptions (Tr. 91). Agent Marsh had not participated in the investigation of petitioners during 1971 and 1972 and had no personal knowledge of the sources from which information in that investigation had come (Tr. 88, 89). Agent Marsh's responsibilities at that time involved security work (Tr. 90). Agent Marsh had no knowledge of the contact that agents working on petitioners' investigation had had with the unlawful 1970 and 1971 interceptions nor of the extent to which those interceptions affected the course of the investigation (Tr. 95, 96).

When Agent Marsh spoke to his fellow agents concerning the possibility of taint, he did not know of the

specific interceptions denominated by petitioners and ruled unlawful by the courts, nor did Agent Marsh have any knowledge as to the use made by other agents of the fruits of these taps in the development of informants or investigative leads. (Tr. 96-100.)

Agent Marsh testified that, as a general Bureau practice, information from unlawful wire interceptions would not be excised from Bureau files. The information, including names and addresses, would remain in various files and indexes prepared from the results of a tap; moreover, the transcriptions themselves would also be kept, even where the tap had been held to be unlawful. (Tr. 85-88.)

The trial court precluded counsel from any more precise inquiry into the means by which informants were developed and their nexus to the nine unlawful taps directed at petitioners and their colleagues (Tr. 101). The trial court also refused inspection *in camera* of Bureau records pertaining to these taps (Tr. 103).

Counsel for petitioners specifically objected to these limitations upon their factual inquiry and urged, without success, that they had been unable effectively to confront Agent Marsh and that they were forced improperly to accept the agent's conclusory hearsay judgments (Tr. 110-111).

Following argument and the taking of evidence on specific and limited motions involving individual petitioners (Tr. 114-173), the hearings were adjourned.

On July 3, 1975, petitioners filed a formal request with the trial court to obtain access to the records of all of the illegal wire interceptions that were the subject of the June 19 suppression hearing. The trial court

heard their request and the Government's opposition on September 5, 1976. Following the hearing, petitioners James A. Lincoln and Ms. Sumpter submitted affidavits in which they specifically averred that there existed a "substantial" possibility that they had spoken with individuals over several of the unlawful tapped telephones. Both petitioners stated that they were unable to aver such facts with absolute certainty because of the lengthy passage of time involved; however, they believed on the basis of memory that a substantial likelihood of such conversations indeed existed.

D. The Trial Court's Rulings

In its first opinion, on July 25, 1975, the trial court ruled that probable cause existed for the 7th Street pen register; that "(w)hile the affidavit of the FBI agent might have been more complete" on the matter of investigative need, a sufficient statement was made to comply with 18 U.S.C. 2518(1)(c); that the investigative objectives had not been achieved by the time of the Landover tap; and that the other contentions raised by appellants were also without merit.

Petitioners' request to obtain the records of the nine unlawful taps was denied on September 23, 1975. In denying that request, the court found that petitioners were engaging in "speculation and conjecture" that they had been overheard since none could state "with certainty" that his voice was intercepted. The court also held that petitioners had failed to make "any showing of taint" at their evidentiary hearing. On that basis, the trial court refused to allow petitioners to examine any records pertaining to the unlawful taps or to make any further inquiry into the connection between those unlawful taps and the 1974 interceptions.

Following the resolution of the trial as earlier described, petitioners filed notices of appeal in order fully to present these issues for appellate resolution. Petitioners' appeal to the Court of Appeals having been unsuccessful, petitioners seek the issuance of a writ of certiorari.

REASONS FOR GRANTING THE WRIT

This case presents two important federal questions concerning procedures by which court-authorized wire interception under the federal statute are carried out. First, it presents the question of the proper procedures to be followed by the trial court in determining questions of standing to attack prior unlawful interceptions and the proper substantive showing required of a defendant asserting such standing. Second, it presents the recurring question of the proper force and application of § 2518(1)(c) of Title 18, requiring of the Government in its wire-interception application full and complete statements as to the utility of prior investigative efforts. It is petitioners' contention that each of these two important federal questions has been resolved erroneously by the United States Court of Appeals for the District of Columbia Circuit.

I. The Decision of the United States Court of Appeals for the District of Columbia Circuit That Petitioners Failed to Establish Standing to Benefit From Nine Prior Illegal Wire Interceptions Erroneously Resolves an Important Question of Federal Law That Has Not Been and Should Be Decided by This Court.

This case poses a problem of recurring frequency in wire-interception litigation and a problem that has particularly reared its head as the bank of unusuable information seized by the Government through judicially declared unlawful wire interceptions has grown.

The problem is this: where a defendant in a wire-interception prosecution identifies with particularity an array of evidence unlawfully seized by wire interception in the past and where there exists a reasonable possibility that such illegal seizures have tainted trial evidence, what showing is required of the litigant to demonstrate standing to benefit from the prior illegalities. There exists also the corollary problem of the proper procedures to be utilized by the trial court in determining threshhold standing questions. The problem has become acute as the fund of illegally seized evidence has grown. That evidence, as in fact was the case here, is often integrated fully into the data base of investigative agencies and used aggressively to develop new sources of information and leads. This case poses important substantive and procedural questions surrounding the ability of a litigant to challenge that kind of governmental conduct.

Petitioners identified for the trial court no fewer than nine wire interceptions occurring within four years of the 7th Street and Landover taps that were later judicially declared illegal as violative of basic statutory and constitutional guarantees. Each involved the FBI or local gambling investigators and each occurred in Washington, D.C. or its close environs. Petitioners went so far as to identify the particular court which had declared the gambling interception unlawful as well as the approximate date on which the decision had been rendered. Many of the unlawful taps involved petitioners directly, some as targets and some directed toward persons said to have preceded petitioners as leaders of their alleged gambling enterprises. The illegality of these nine interceptions is not apparently disputed, nor is their gambling orientation. Petitioners

were precluded access to the unlawful taps on questions of taint and standing, however, because it was held that no petitioner was clearly shown to have been a party to any of the seized conversations, an asserted requirement of the standing doctrine.

Section 2518(10)(a) of Title 18 permits any "aggrieved person" to move to suppress evidence derived from electronic surveillance. Section 2510(11) defines an "aggrieved person" as one "who was a party to any intercepted wire or oral communication or a person against whom the interception was directed." These requirements, intended to reflect existing law at the time they were enacted, were reaffirmed by the Supreme Court in *Alderman* v. *United States,* 394 U.S. 165, 171-174 (1969).

In the context of the present litigation, compliance with § 2510(11) and *Alderman* was less than easy because of the passage of time. The latest of the illegal interceptions occurred in 1973. Petitioners were indicted in 1975 and the matter litigated through 1976. The essence of wire interception is secrecy. It is unlike physical searches, which are knowable events at the time of their occurrence to all of those who are affected by them. Thus, in the present case, each petitioner was required to demonstrate that he was overheard in telephone communications intercepted unbeknownst to him over various telephones years previous. Petitioners James A. Lincoln and Rosa L. Sumpter both averred that there existed a "substantial possibility" that they were speakers over particular tapped telephones, which they identified. The Government responded with a bare letter denial that it could find no evidence of petitioners' voices on the earlier illegal interceptions. Petitioners were granted no access to the unlawful interceptions of 1970 through 1973 nor did the trial court conduct any *in camera* inquiries. We respectfully submit that these events were procedurally and substantively defective for the following reasons.

First, averments that a "substantial possibility" of interception exists are sufficient to establish standing or at least to toll additional inspection obligations by the trial court. *Cf. United States* v. *Fannon,* 435 F.2d 364 (7th Cir. 1970). In the circumstances of this case, we believe these renditions of "substantial possibility" as opposed to absolute certainty are manifestly sufficient to create standing sufficient to obtain access to the interceptions in question pursuant to *Alderman* and to *Zweibon* v. *Mitchell,* 516 F.2d 594, 606 n.14 (1975) (*en banc*), *cert. denied,* 425 U.S. 944 (1976).

Second, the bare unsworn letter denial of the Government that it could find no indication that petitioners had been overheard is not enough to overcome these sworn assertions by petitioners, particularly petitioner Sumpter. Ms. Sumpter testified under oath that she was the victim of unlawful interceptions at her residence that occurred shortly before the 1974 taps and that gave to FBI agents intimate knowledge of her personal affairs, with which they thereafter confronted her. (Tr. 116-134.) During a hearing before the court, Ms. Sumpter alleged two occurrences which seemed to point to an illegal wiretap on her telephone on the part of Agent Teasley. Under oath, Agent Teasley denied making an illegal wiretap of Ms. Sumpter's telephone. The court's memorandum of July 25, 1975 stated "Sumpter's testimony at the hearing was insufficient to show that the government had engaged in such interception," and the motion was denied.

The trial court's holding does not reflect the current status of the law. *Korman* v. *United States,* 486 F.2d 926, 931 (7th Cir. 1973), holds that a letter of denial of electronic surveillance by the Department of Justice is not sufficient and that "an official government denial of electronic surveillance must at the very least be submitted in the form of an affidavit by a responsible government official." In a footnote (n.10), the court stated it would accept as sufficient a denial under oath by "a United States Attorney in charge of the probe or an agency head in charge of the investigation."

Korman was followed by *In re Dellinger,* 502 F.2d 813, 818 (7th Cir. 1974), *cert. denied,* 420, U.S. 990 (1975), *United States* v. *Van Drunen,* 501 F.2d 1393, 1399 (7th Cir.), *cert. denied,* 419 U.S. 1091 (1974), and *In re Buscaglia,* 518 F.2d 77, 79 (2d Cir. 1975). In *United States* v. *D'Andrea,* 495 F.2d 1170, 1174 n.12 (3rd Cir. 1974), *Korman* was distinguished, not without misgivings (the court held the *Korman* rule preferable but not required), because only a "bald accusation of illegality" had been made. But in Rosa Sumpter's case, much more than a "bald accusation" has been made.

In re Hodges, 524 F.2d 568 (1st Cir. 1975), accepts oral government testimony as a sufficient denial of electronic surveillance, and cites several other cases in agreement. But *Hodges* and the cases it cites (except *D'Andrea* considered above) deal with grand jury witnesses seeking to be excused from answering government questions, and not with defendants in criminal cases. Recent cases of the latter type—and of course Rosa Sumpter falls in this class—consistently demand more than an oral denial or a written conclusory statement by a government official.

Third, in many instances standing itself requires an analysis of the contents of the intercepted communications. In the present case, petitioners were not fishing wildly for prior illegality. They identified nine specific unlawful taps which had occurred during the very years that the FBI claimed to have been investigating them. None of the petitioners would foreclose the possibility that his voice had been intercepted. Most simply could not remember the daily pattern of their telephone calls years previous with concrete specificity. Rather than misrepresent their recollections, it was requested that access be provided to the interceptions in order that the "chicken-and-egg" standing dilemma might be resolved. Such access was clearly required as was a more detailed examination by the trial court of documents and materials relating to the nine illegal taps. *United States* v. *Fannon, supra* at 366-367.

In *Fannon,* a co-defendant was the subject of electronic surveillance. The Government stated that there was no eavesdropping upon defendant Fannon, no interception of his conversations and no eavesdropping or interceptions of any persons upon the defendant's premises. Fannon then moved for inspection of various documents and records relating to the electronic monitoring of the co-defendant. "The motion was aimed at establishing Fannon's standing to show the evidence used against him at his trial arose from the government's illegal conduct." *Id.* at 366. The trial court denied him that opportunity, citing *Alderman* and the asserted absence of any right to an adversary hearing on the standing issue, and relying further upon an unsworn negative answer from a government attorney on the question of eavesdropping of Fannon.

The Seventh Circuit reversed, in language that is directly apposite here:

> The issue before us is whether Fannon is entitled to the discovery sought by his motion as a means of establishing his standing to show that evidence introduced at his trial arose from the illegal monitoring by the government. We think that Alderman v. United States, 394 U.S. 165, 89 S.Ct. 961 (1968), implicitly requires that Fannon's motion for discovery be granted.
>
> *Alderman* expressly requires an adversary hearing for one with standing to prove that his conviction was tainted by use of evidence which arose from illegal monitoring of conversations, either of his or of others upon his premises, whether or not he was present or participated in the latter. Where illegal monitoring is conceded, a petitioner must have an opportunity to prove that a substantial part of the case against him was the fruit of the government's illegal conduct. *Alderman, supra,* 394 U.S. at 183, 89 S.Ct. 961.

While *Alderman* does not expressly deal with the issue of standing, we think that without a fair opportunity to prove standing, the right to the opportunity to show a tainted trial—announced in *Alderman*—is a right without value. The government concedes here that it has conducted illegal eavesdropping upon conversations of a Fannon co-defendant. For that reason we think, to establish standing, he has the right to go forward with proof that his conversations, or those of others on his premises, whether or not he was present or participated, was overheard. This proof is needed as a basis for availing himself of the opportunity which *Alderman* holds he has the right to with respect to the main issue whether his trial was tainted. Neither the district court's *in camera* inspection nor the unsworn answers of the prosecutor to the

court's questions, nor both, adequately respond to the implicit requirement in *Alderman,* and in the Supreme Court's remand of this case, of a fair opportunity to establish standing.

The government conducts surveillance generally through federal agents, and the fruits of the surveillance are either turned over by the agents to the government prosecutors or retained by the agents. Where a co-defendant's conversations have been monitored, as here, a defendant has available, to establish standing, only his fear that it is likely that the fruits of the government's illegal eavesdropping contain evidence which aided the prosecution in its case against him. Only the government knows the facts. Fannon's discovery motion is a prudent effort to learn the facts.

We hold therefore that the district court erred in denying Fannon's motion for additional discovery. The district court's judgment is reversed and the cause is remanded for further proceedings consistent with the views expressed in this opinion.

Id. at 366-367. (Footnote omitted.) We believe that the rationale of the Seventh Circuit in *Fannon* is absolutely correct and that the decision in that case conflicts directly with that here.[10] These petitioners deserved some access to the unlawful interceptions these identified in order to establish their standing. And they received none.

Fourth, without belaboring the point, we note that the peculiar nature of wire interception has caused a number of courts to find standing for all attacks upon defects in a particular interception even where a de-

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[10] *Fannon* is particularly apposite because the original conviction of the defendant was vacated by the Supreme Court precisely because of the electronic eavesdropping problem. *Id.* at 365.

fendant may not have been overheard on preexisting interceptions. See, *e.g., United States* v. *Gibson,* 500 F.2d 854, 855 (4th Cir.), *cert. denied,* 419 U.S. 1106 (1974); *People* v. *Brown,* 364 N.Y.S.2d 364 (1975); *People* v. *Koutnik,* 353 N.Y.S.2d 197 (1974). Each petitioner here was intercepted on the 1974 taps and has clear standing to object to all of the defects of those interceptions pursuant to 18 U.S.C. § 2518(10)(a) and § 2510(11). Particularly where there is alleged to have been a pattern of illegality and an intertwining of several interceptions, as here, these broadened notions of standing seem appropriate.

We respectfully submit that the Court of Appeals response to each of these matters is not compelling. As to petitioners' averment that a "substantial possibility" existed that they were overheard, the court concedes that "few accused of crime will be honestly able to be more specific as to discussions allegedly held several years earlier." (Slip op. at 17.) The court then simply asserts that to compel any disclosure would place the Government under a burden that was "both unprecedented and dangerous." *Id.* We believe that is simply wrong, as the *Fannon* court held. Moreover, it was here the case that the interceptions in question had been judicially determined to have been unlawful. They had already been disclosed in other forums and litigated. The disclosure argument thus loses virtually all of its force. As to the letter denial, the court simply declines to adopt the Seventh Circuit's position in *Korman.* (Slip op. at 14, fn.38.) As to the need for a more active inquiry by the trial court on the question of standing, the court conclusorily determines that it was not necessary here and leaves open the question of when it may be required in the future. *Fannon* is not dealt with.

(Slip op. at 16-17.) Finally, the court declines to adopt the more expansive notions of standing discussed above and adverted to in *Gisbon, Brown,* and *Koutnik.* (Slip op. at 9-10, fn.21.)

These are important and recurring issues of federal jurisprudence. For the reasons set forth above, we respectfully believe that they have been decided erroneously by the Court of Appeals for the District of Columbia and that a writ of certiorari should thus issue.

II. The Decision of the Court of Appeals for the District of Columbia Circuit That the Government Complied with 18 U.S.C. § 2518(1)(c) Erroneously Resolves an Important Question of Federal Law That Has Not Been and Should Be Decided by This Court.

The wire-interception applications utilized by the Government in this case fail to set forth fully and completely the requisite information on the use of other investigative techniques as required by 18 U.S.C. 2518(1)(c). The 7th Street application and the Landover application both contain what is essentially a general and conclusory boilerplate recitation, three or four sentences long, that is neither "full" nor "complete."[11] Such pleading techniques are in direct violation of the commands of 18 U.S.C. 2518(1)(c).

A. The Function and Importance of Section 2518(1)(c)

Wire interception is an extra-ordinary investigative technique. Its difficulty of administration, potential for constitutional abuse, and chilling effect on the normal

[11] Indeed, both recitations appear in the "Summary and Prayer" section of the applications. Seventh Street application at 73-74. Landover application at 60.

candor of the community have carved for it a special place in the law.[12] For a great while, it was proscribed by federal statute.[13] Such proscriptions applied across the board in federal courts and included evidence secured by state law enforcement officials as well as federal.[14]

In 1967, the Supreme Court put its imprimatur upon a limited and highly controlled system of court-authorized and court-supervised wire interception.[15] It found no constitutional infirmity in the use of such an investigative technique, provided a wide variety of constraints designed to render wire interception consistent with the demands of the Fourth Amendment were imposed. Among these requirements were those of antecedent justification of the proposed interception to a neutral and detached magistrate upon oath and supported by probable cause; a particularized description of the communications to be seized; an interception limited in scope and duration to the specific purpose of establishing the contents of the particular communications to be

[12] The potential constitutional and practical difficulties involved in the use of wire interception devices are detailed in Dash, Knowlton & Schwartz, *The Eavesdroppers* 1959), pp. 303-379; see also Westin, *Privacy and Freedom* (1967), pp. 73-78.

[13] Section 605 of the Federal Communications Act of 1934 prohibited the interception and divulgence of the contents of any wire communication by either law enforcement officials or private persons. 48 Stat. 1103 (1934). These provisions were passed six years after and in response to the Supreme Court's decision in *Olmstead* v. *United States*, 277 U.S. 438 (1928), that wiretapping did not constitute a search within the meaning of the Fourth Amendment.

[14] See, *e.g.*, *Benati* v. *United States*, 355 U.S. 96 (1957).

[15] *Berger* v. *New York*, 388 U.S. 41 (1967); *Katz* v. *United States*, 389 U.S. 347 (1967).

seized; and termination of the interception immediately upon seizure of these conversations.[16]

Standing alongside these constitutional preconditions was another. The Fourth Amendment normally demands that notice be given by the Government to the suspect at the place and time that searches for tangible items occur. The usefulness of electronic surveillance, however, "depends on the lack of notice to the suspect." [17] Indeed, the giving of notice would likely cause a situation analogous to that where announcement of a search for tangible items provoked destruction of the very items o be seized: foreknowledge of electronic surveillance would cause the words to be seized likely to go unuttered.[18] As a result of this line of analysis, the Supreme Court concluded that prior or contemporaneous notice of the interception of communications by court authorization is not constitutionally required. To justify constitutionally such an omission to give notice, the court imposed the precondition that there be some "showing of exigency, in order to avoid notice." [19]

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 [20] endeavors to satisfy each of the constitutional requirements for wire interception set forth in *Katz* and *Berger*. As regards the required

[16] *Berger* v. *New York*, *supra*, at 55, 59-60; *Katz* v. *United States*, at 354-355, 359.

[17] *Katz* v. *United States*, at 358, fn. 22.

[18] *Katz* v. *United States*, at 355-256, fn. 16.

[19] *Berger* v. *New York*, at 60.

[20] P.L. 90-351, 82 Stat. 211-225 (June 19, 1968), 18 U.S.C. 2510 *et seq.*

showing of exigency, Section 2518(1)(c) of Title III specifies that as a prerequisite to any wire interception whatever, the application must contain:

> A full and complete statement as to whether or not other investigative procedures have been tried and failed or why they appear to be unlikely to succeed if tried or to be too dangerous.

Section 2518(3)(c) imposes the duty upon the reviewing court to determine before issuing any wire-interception authorization that:

> Normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous.

The American Bar Association "Standards Relating to Electronic Surveillance,"[21] which parallel Title III closely, make clear that these provisions are intended to insure the requisite exigency.

The Senate Committee on Title III speaks forcefully to the need for these kinds of findings. It notes that the required showing of exigency is "patterned after traditional search warrant practice and present English procedure in the issuance of warrants to wiretap by the Home Secretary." Thereafter, the Senate Committee describes the kinds of normal investigative procedures that must be found wanting before wire interception can begin:

> Normal investigative procedures would include, for example, standard visual or aural surveillance techniques by law enforcement officers, general questioning or interrogation under an immunity grant, use of regular search warrants, and the infiltration of conspiratorial groups by undercover agents or informants."

[21] ABA Proposed Standards Relating to Electronic Surveillance (1968) at 140-141.

The Department of Justice itself in its Manual for Conduct of Electronic Surveillance under Title III states: "interception under Title III is to be considered an investigative tool of last resort." See, *United States* v. *King*, 335 F. Supp. 523, 541-542 (S.D. Calif. 1971), *modified*, 478 F.2d 494 (9th Cir.), *cert. denied, sub nom. Light* v. *United States*, 414 U. S. 846 (1973).

The central importance and rigor of application of Section 2518(1)(c) has found wide judicial expression. The Supreme Court in reviewing the provisions of Title III affirmed that "wiretapping is not (to be) resorted to in situations where traditional investigative techniques would suffice to expose the crime." *United States* v. *Kahn*, 415 U.S. 143, 153 n. 12 (1974). See also, *United States* v. *Giordano*, 416 U.S. 505, 515 (1974). Various circuits have been unremitting in their command that a "full and complete" statement describing the insufficiency of "traditional investigative techniques," as mandated by Section 2518(1)(c), is an absolutely essential element of a valid interception application. See, *e.g.*, *United States* v. *Vento*, 533 F.2d 838 (3d Cir. 1976); *United States* v. *Kalustian*, 529 F.2d 585, 590 (9th Cir. 1975).[22] General declarations of investigative difficulty will not suffice. *United States* v. *Vento*, *supra* at 849. Nor will conclusory statements or

[22] Senate Report No. 1097, April 29, 1968, accompanying Omnibus Crime Control and Safe Streets Act of 1968, at 101.

[23] See also, *United States* v. *Kerrigan*, 514 F.2d 35, 38 (9th Cir.), *cert. denied, sub nom. Kerrigan* v. *United States*, 423 U.S. 924 (1975); *United States* v. *Curreri*, 388 F. Supp. 607, 608 (D. Md. 1974).

boilerplate recitations, "lest wiretapping become established as a routine investigative recourse of law enforcement authorities, contrary to the restrictive intent of Congress." *Id.* at 849-850. With regard to gambling, it has been said that "law enforcement agencies may not rely upon the general difficulty of apprehending and convicting bookmakers to justify the use of wiretapping." *United States* v. *Feldman,* 535 F.2d 1175, 1178 (9th Cir. 1976). Rather, the affidavit must contain a description of specific alternative procedures relating to the particular case at hand. While these procedures need not have been exhausted, the application must contain a "full and complete statement" as to why they are unworkable within the framework of the particular investigation. Conclusory assertions, boilerplate and appeals to "general investigative experience" are not consistent with the section's commands nor are they consistent with the important constitutional purpose it serves.[24]

B. The 7th Street and Landover Applications

The 7th Street and Landover applications are virtual models of statutory insufficiency and commit the very vices of generality, conclusiveness and boilerplate that all courts have found objectionable.

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[24] Those cases in which the Government has surmounted Section 2518(1)(c) attacks generally involve applications with significantly more than statements of general investigative experience or conclusory boilerplate. Specific examples of surveillance inability, unsuccesaful agent penetration, inability to execute search warrants and the like are fully described. See, *e.g., United States* v. *Schaefer,* 510 F.2d 1307, 1310 (8th Cir.), *cert. denied,* 421 U.S. 978 (1975); *United States* v. *O'Neill,* 497 F.2d 1020, 1025 (6th Cir. 1974); *United States* v. *Bobo,* 477 F.2d 974, 982 (4th Cir. 1973), *cert. denied, sub nom. Gray* v. *United States,* 421 U.S. 909 (1975).

Both applications contain, at best, four sentences that purport to constitute the "full and complete statement." [25] The first sentence of each relates, with some ambiguity, that an investigation, using surveillance, informants and traditional investigative techniques, of "a large scale racketeerng activity" has been occurring for over five years. The affiant fails to describe the relationship between this investigation and the current case. Further, he fails to state even whether the investigation involved gambling activity or any of these target appellants. The second sentence merely asserts that no conclusive evidence for prosecution has been developed from "(t)his investigation." The third sentence makes the bald assertion that informants refuse to testify about gambling activity and have advised their contacting agents to that effect. The final sentence is a conclusory summarization of the preceding three: "it is reasonably concluded the continued use of normal investigative techniques would not bring this matter to a successful conclusion."

By no stretch of the imagination can the semantic exercise contained in these four sentences be considered a "full and complete statement as to whether or not other investigative procedures have been tried." It is in fact four disjointed sentences, three of which are axiomatic investigative banalities that say virtually nothing, and a fourth which is merely repetitious and baldly conclusory. Moreover, the entire "statement" is contained not in a separate section of the application reserved for compliance with the critically important requirements of Section 2518(1)(c). Rather, it appears as the introduction to the boilerplate "summary and prayer" that

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[25] 7th Street application at 73-74; Landover application at 60.

concludes the application, a further indication of the cavalier treatment given the matter by the Government. Indeed, the four-sentence piece is far shorter and less specific than the *Kalustian* submission, which the Ninth Circuit found insufficiently full and complete.

The matter is even more troublesome when viewed in light of the preceding pages in the Government's applications. Far from showing a complete absence of success by the use of traditional investigative techniques, the Government's applications show physical surveillance and informant cooperation of a significant level. Fifty surveillances over some fifteen pages of the 7th Street application are recited (7th Street application at 40-55). These sightings are made of the putative targets of the tap at central locations thought to be headquarters for the gambling operation. These sightings occurred continuously for a period of almost one year without having been discovered. In addition, information obtained by the Government by means of the pen register was deemed to be equally significant (*Id.* 55-56), and informants were said to have provided specific details about the manner of operation of the alleged enterprise (*Id.* at 19-34).

The state of this pre-tap investigation knowledge should be compared to that in *United States* v. *James*, 494 F.2d 1007, 1016, *cert. denied, sub nom. Jackson* v. *United States*, 419 U.S. 1020 (1974), a case in which surveillance was minimal, informations limited to one (and that not clearly reliable), and all other avenues of information either scanty or foreclosed. Similar investigative difficulties regarding informants or surveillance problems may be found in a host of other cases in which wiretapping was ultimately approved. In *United States* v. *Focarile*, 340 F. Supp. 1033 (D. Md.), *affirmed*

sub nom. United States v. *Giordano*, 469 F.2d 522 (4th Cir. 1972), *affirmed*, 416 U.S. 505 (1974), surveillance of the location of the lawful activity was described as largely impossible, since the apartment was located in a high-rise building. Wire interception was also justified in *United States* v. *King, supra.*, because surveillance of the defendants' activities was impossible without easy detection (the defendants operated a boat far from shore. In the present case, the Government conducted more than fifty successful and undetected surveillances over a period of at least six months. In *Focarile*, there was but one informant who had had dealings with the target defendants and he was unable to infiltrate their organization without arousing suspicion. In *United States* v. *O'Neill, supra.*, informants were equally unable to furnish meaningful information about the alleged unlawful gambling enterprise. This was also the case in *James*. Here, the twelve informants described by the Government were well integrated into the gambling organization, well-acquainted with and trusted by its alleged principals, and able to do whatever they pleased to gather the information needed to build a prosecutable case.

The foregoing is not meant only to suggest that wire interception may not have been justified in this case. The highly detailed recitation of the apparently successful investigation by traditional means underscores the need for the "full and complete" statement supporting resort to wire interception and the utter inadequacy of the four-sentence offering supplied by the Government.. The heart of the Government's application simply raises questions of investigative need that the Government failed completely to answer.

The failure of the Government to meet this critical requirement in the present case is monumental. The trial court itself was sufficiently troubled by the brevity and generality of the statement of investigative need to observe that "the affidavit of the FBI agent might have been more complete on this point."[26] In finding that the lack of completeness did not constitute a violation of Section 2518(1)(c), the trial court held that, "the burden on the Government under this provision is not a great one." From that postulate, the court concluded that the insubstantial four-sentence presentation contained in the application sufficed. Petitioners respectfully submit that the trial court's undervaluation of Section 2518(1)(c) is contrary to the provisions of the statute itself, to its legislative history and to the meaning that the Supreme Court and other Circuit Courts of Appeal have given to this very central provision.

The Court of Appeals itself concluded that the summary and prayer portions of the affidavit dealing with investigative need "are framed in conclusory terminology." (Slip op. at 22.) The court then held that when read in conjunction with the body of the affidavit, the conclusory terminology carried sufficient particularity. As we have suggested earlier, however, the body of the affidavit relates a history of investigative action that is essentially successful, unimpeded and not of the frustrated character normally associated with electronic surveillance.

Questions relating to the proper application and force to be given § 2518(1)(c) and to the rigor by which it must be applied abound. They are daily faced by federal tribunals. It is our submission that that issue as

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[26] Opinion of July 25, 1975.

here posed was wrongly decided by the Courts of Appeals, which undervalued drastically the protections of § 2518(1)(c) and gave improper weight to a perfunctory boilerplate statement at the conclusion of the lengthy wiretap application. For this reason as well, we respectfully request that the writ of certiorari issue.

CONCLUSION

Wherefore, petitioners respectfully ask that the writ of certiorari issue.

Respectfully submitted,

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June 11, 1978

APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1169

UNITED STATES OF AMERICA

v.

GEORGE WILLIAMS, JR., APPELLANT

No. 76-1355

UNITED STATES OF AMERICA

v.

ROSA L. SUMPTER, APPELLANT

No. 76-1356

UNITED STATES OF AMERICA

v.

ROSA L. SUMPTER, APPELLANT

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

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No. 76-1406

UNITED STATES OF AMERICA

v.

LUSSIA REIN, APPELLANT

No. 76-1635

UNITED STATES OF AMERICA

v.

JAMES A. LINCOLN, APPELLANT

No. 76-1636

UNITED STATES OF AMERICA

v.

MARY L. LINCOLN, APPELLANT

No. 76-1637

UNITED STATES OF AMERICA

v.

MICHELE E. LINCOLN, APPELLANT

3

No. 76-1638

UNITED STATES OF AMERICA

v.

ALBERT LINCOLN, APPELLANT

No. 76-1639

UNITED STATES OF AMERICA

v.

NORRIS DUBOSE, APPELLANT

No. 76-1640

UNITED STATES OF AMERICA

v.

THELMA DUBOSE, APPELLANT

Appeals from the United States District Court
for the District of Columbia

(D.C. Crim. Action Nos. 75-82, 76-33 and 75-227)

Argued March 23, 1977

Decided April 12, 1978

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Fred Warren Bennett (appointed by this court) for appellant in No. 76-1169.

Roger E. Zuckerman, with whom *James L. Lyons, Jack Sinclair, Fred Bennett* and *Edward O'Connell* were on the brief, for appellants in Nos. 76-1355, 76-1356, 76-1406, 76-1635, 76-1636, 76-1637, 76-1638, 76-1639 and 76-1640.

Larry C. Willey, Assistant United States Attorney, with whom *Earl J. Silbert*, United States Attorney, *John A. Terry* and *Robert Richard Chapman*, Assistant United States Attorneys, were on the brief, for appellee.

Before McGOWAN, ROBINSON and WILKEY, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* ROBINSON.

ROBINSON, *Circuit Judge*: Appellants were indicted on an assortment of charges stemming from their alleged participation in a gambling operation.[1] After they sought unsuccessfully to suppress conversations monitored by judicially authorized wiretaps,[2] they waived jury trials and were variously convicted on the basis of stipulated facts, thus preserving for appellate consideration their

[1] In thirteen counts appellants Rosa L. Sumpter, Lussia Rein and George Williams, Jr., together with five other persons, were charged under 18 U.S.C. § 1955 (1970) with conducting an illegal gambling business, under D.C. Code § 22-1501 (1973) with operating a lottery, under D.C. Code § 22-1502 (1973) with possession of numbers slips, and under D.C. Code § 22-1605 (1973) with maintaining gambling premises. Appellant Sumpter was also charged under 18 U.S.C. § 1952 (1970) with use of a telephone in interstate commerce in aid of unlawful activity. A separate three-count indictment similarly charged appellants James A. Lincoln, Mary L. Lincoln, Michele E. Lincoln, Albert Lincoln, Norris DuBose and Thelma DuBose with violations of §§ 1955 and 22-1501 and James and Albert Lincoln with a violation of § 1952.

[2] See Omnibus Crime Control and Safe Streets Act of 1969, Pub. L. No. 90-351, tit. III, § 802, 82 Stat. 216, 18 U.S.C. § 2515 (1970). Hereinafter, citations will be to the Act as codified.

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suppression claims. Finding no error in the District Court's ruling thereon, we affirm.

I

For about five years prior to 1974,[3] appellants' gambling business was the target of federal scrutiny through the use of informants and surveillance by agents of the Federal Bureau of Investigation.[4] Intelligence thus derived fostered the belief that a house on Seventh Street, Northwest, in the District of Columbia was the locus of a numbers operation,[5] and the FBI, by the District Court's authorization, installed pen registers on two telephones therein.[6] About two months later, on information gleaned

[3] Appellants' Appendix (App.) 128.

[4] App. 82-112.

[5] App. 82-93.

[6] App. 113. "A pen register is a mechanical device that records the numbers dialed on a telephone by monitoring the electrical impulses caused when the dial on the telephone is released. It does not overhear oral communications and does not indicate whether calls are actually completed." *United States* v. *New York Tel. Co.*, —— U.S. ——, —— n.1, 98 S.Ct. 364, 366 n.1, 54 L.Ed.2d 376, 382 n.1 (1977). The standards governing orders authorizing the installation of pen registers are to be found in the Fourth Amendment and Fed. R. Crim. P. 41. *Id.* at ——, 98 S.Ct. at 370-371, 54 L.Ed. 2d at 387-388.

Appellants claim that the District Court erred in finding probable cause for resort to the pen registers. We think the affidavit supporting the application therefor contains adequate validating data. The affidavit, after summarizing material connoting the reliability of numerous confidential informants, App. 12-15, sets forth information from those sources comfortably establishing probable cause to believe that appellant Sumpter was engaging in telephone conversations thereat which furthered a numbers business. App. 16-21. The affidavit also describes surveillance of the Seventh

to that point, authority to intercept communications over one of these lines was conferred.[7] After cessation of that wiretap, approval for electronic surveillance of two telephones at a house on Landover Road, in Maryland, was obtained.[8] Search warrants were subsequently executed at District and Maryland locations where the FBI believed the operation was progressing.[10]

Indictments followed,[11] and appellants soon filed pretrial suppression motions. After two days of hearings, the District Court deferred consideration of one motion and denied the remainder,[12] and after a further hearing re-

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Street house, which disclosed that Sumpter was frequently there at times when numbers activity was reasonably thought to be occurring. App. 24-33.

Pursuant to a subpoena duces tecum, Chesapeake & Potomac Telephone Company supplied the numbers of the two telephones at the Seventh Street address. App. 22. Appellants argue that the affidavit and application do not say that they were the only telephones there. The District Court found that

> [w]hen read in a commonsense fashion, the affidavit shows that in response to a subpoena duces tecum, Chesapeake & Potomac Telephone Company provided the numbers of all phones which its records showed at [Seventh Street]. The court, therefore, finds that the affidavit demonstrated probable cause for the authorization of pen registers on the numbers shown in the affidavit.

App. 414. We find no error in this respect.

[7] App. 50-132; see 18 U.S.C. § 2518(3) (1970).

[8] App. 133-136.

[9] App. 145-275.

[10] App. 422-425.

[11] See note 1 *supra*.

[12] App. 409-427. No appeal was taken from the District Court's decisions on several of the pretrial motions.

jected the deferred motion.[13] In this court, appellants contend that access to the conversations overheard in 1974 on the Seventh Street and Landover telephone lines was tainted by nine concededly illegal wiretappings conducted between 1970 and 1973. They also argue that the applications for the Seventh Street and Landover interceptions were defective under Title III of the Omnibus Crime Control and Safe Streets Act of 1969.[14] Thus they challenge on both grounds the court's refusal to ban the use of evidence derived by electronic surveillance at the Seventh Street and Landover locations. We now examine, in turn, these assertions of error.[15]

II

The illegality of the nine 1970-73 wiretaps is not in dispute, for each has already been the subject of a judicial declaration to that effect.[16] The disagreement is over

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[13] App. 428-430.

[14] 18 U.S.C. §§ 2510 *et seq.* (1970 and Supp. V 1975).

[15] Appellant George Williams, Jr., urges additionally that the District Court stumbled in ruling that the failure to serve him with an inventory notice, as directed by 18 U.S.C. § 2518(8)(d) (1970), did not warrant suppression of the wiretap evidence. After the court had ruled, however, the Supreme Court handed down its decision in *United States* v. *Donovan*, 429 U.S. 413, 97 S.Ct. 658, 50 L.Ed.2d 652 (1977), in which it held that nonobservance of this statutory specification, at least when not in bad faith, does not require suppression of intercepted communications. *Id.* at 435-437 & n.23, 97 S.Ct. at 672-673 & n.23, 50 L.Ed.2d at 672-674 & n.23. Since Williams has nowhere contended that bad faith was an element of the Government's omission to provide the authorizing judge with his name so that an inventory notice could be sent to him, *Donovan* dictates that the suppression remedy may not be invoked.

[16] The relevant events are recounted in Brief for Appellants' at 9-14. The Government has not disputed the accuracy of that description of the nine wiretaps.

whether the Seventh Street and Landover wiretaps were similarly unlawful by reason of linkage to those transpiring before.[17] We need not reach this dispute, however, because we ultimately hold that the District Court properly concluded that appellants failed to establish their standing to benefit from any error inhering in the earlier monitoring.

Before an accused may be heard to complain that prosecution evidence should be suppressed because it was come by illegitimately, he must first make out his standing, which generally entails a demonstration that his own interests were affected by the challenged search or seizure.[18] With particular regard to electronic eavesdropping, the accused must show that it was directed at *him*, that the Government intercepted *his* conversations or that the wiretapped communications occurred at least partly on *his* premises.[19] Unless he can establish one of these events,

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[17] Specifically, appellants contend that material derived from some of the 1970-73 wiretaps may have been used to develop four of the confidential sources of information instrumental in obtaining judicial leave to install the Seventh Street and Landover wiretaps.

[18] *Alderman* v. *United States*, 394 U.S. 165, 171-174, 89 S.Ct. 961, 965-967, 22 L.Ed.2d 176, 185-187 (1969).

[19] See *id.* at 176, 89 S.Ct. at 968, 22 L.Ed.2d at 188 (accused has standing to challenge electronic surveillance "if the United States unlawfully overheard conversations of [accused] himself or conversations appearing on his premises"); *United States* v. *(Frank) Scott*, 164 U.S. App. D.C. 125, 128, 504 F.2d 194, 197 (1974), *appeal following remand*, 170 U.S. App. D.C. 158, 516 F.2d 751 (1975), *cert. denied*, 425 U.S. 917, 96 S.Ct. 1519, 47 L.Ed.2d 768 (1976); *United States* v. *Bellosi*, 163 U.S. App. D.C. 273, 282, 501 F.2d 833, 841-842 (1974); *Light* v. *United States*, 529 F.2d 94, 96 (9th Cir. 1976); 18 U.S.C. § 2518(10)(a) (1970) ("aggrieved person . . . may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom"); *id.* § 2510(11) (" 'aggrieved person' means a person who is a

it is legally irrelevant that the surveillance was unlawful. And this rule remains true even if acquisition of the questioned evidence was not the direct result of unlawful conduct but instead was the fruit of the proverbial poisonous tree.[20] Thus, it was incumbent upon each appellant seeking to contend that the earlier unlawful wiretaps tainted the later ones at Seventh Street and Landover and the evidence therefrom to show that the prior misconduct made possible an interception of his conversations or a breach of the privacy of his premises.[21]

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party to any intercepted wire or oral communication or a person against whom the interception was directed"). See generally Decker & Handler, *Electronic Surveillance: Standards, Restrictions and Remedies*, 12 Cal. West. L. Rev. 60, 97 (1975) (Congress intended to adopt Fourth Amendment standing requirements).

[20] *Alderman* v. *United States*, *supra* note 18, 394 U.S. at 172-173, 89 S.Ct. at 965-966, 22 L.Ed.2d at 186, quoting *Wong Sun* v. *United States*, 371 U.S. 471, 492, 83 S.Ct. 407, 419, 9 L.Ed.2d 441, 458 (1963) and *Jones* v. *United States*, 362 U.S. 257, 261, 80 S.Ct. 725, 731, 4 L.Ed.2d 697, 702-703 (1960); *United States* v. *Magaddino*, 496 F.2d 455, 460 (2d Cir. 1974).

[21] *United States* v. *Plotkin*, 550 F.2d 693, 695 (1st Cir.), *cert. denied*, —— U.S. ——, 98 S.Ct. 61, 54 L.Ed.2d 76 (1977); *United States* v. *Scasino*, 513 F.2d 47, 50-51 (5th Cir. 1975); *United States* v. *Abramson*, 553 F.2d 1164, 1170 (8th Cir.), *cert. denied*, 433 U.S. 911, 97 S.Ct. 2979, 53 L.Ed.2d 1095 (1977); *Nolan* v. *United States*, 423 F.2d 1031, 1042 (10th Cir.), *cert. denied*, 400 U.S. 848, 91 S.Ct. 47, 27 L.Ed.2d 802 (1970). See also *United States* v. *Gibson*, 500 F.2d 854, 855 (4th Cir. 1974), *cert. denied*, 419 U.S. 1106, 95 S.Ct. 777, 42 L.Ed.2d 802 (1975).

As we have stated, each appellant has standing to object to any defect in the Seventh Street and Landover wiretaps on which he or she was concededly overheard. Appellants contend more extensively that any use of information from the unlawful 1970-73 wiretaps in obtaining the Seventh Street and Landover authorizations produced a flaw in the ensuing

It is clear, however, that to facilitate an accused's effort to demonstrate that evidence employable against him is contaminated by illegal surveillance previously conducted, the Government, upon request, must "affirm or deny the occurrence of the alleged unlawful act." [22] And where, as here, it is unquestioned that there has been electronic eavesdropping and that it was unlawful, the pertinent response is one indicating whether the accused himself was victimized thereby. If the Government answers in the affirmative, the accused is entitled to examine the records incorporating the contents of any monitored conversation that he has standing to attack.[23]

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wiretaps, and that they therefore may complain of infirmities of that sort even if their own voices were not overheard or their own premises were not involved during the earlier illegal eavesdropping. That argument has been rejected by numerous courts. We agree that an accused is unable to attack in this indirect fashion those wiretaps that he could not challenge directly. See, *e.g.*, *United States* v. *Fury*, 554 F.2d 522, 525-526 (2d Cir.), *cert. denied*, 433 U.S. 910, 97 S.Ct. 2978, 53 L.Ed.2d 1095 (1977); *United States* v. *Wright*, 524 F.2d 1100, 1102 (2d Cir. 1975); *United States* v. *Scasino*, *supra*, 513 F.2d at 51.

[22] Act of Oct. 15, 1970, Pub. L. No. 91-452, tit. VII, § 702(a), 84 Stat. 935, 18 U.S.C. § 3504(a)(1) (1970); see *In re Evans*, 146 U.S. App. D.C. 310, 313, 318, 452 F.2d 1239, 1242, 1247 (1971), *cert. denied*, 408 U.S. 930, 92 S.Ct. 2479, 33 L.Ed.2d 342 (1972).

[23] *Alderman* v. *United States*, *supra* note 18, 394 U.S. at 184, 89 S.Ct. at 972, 22 L.Ed.2d at 193; *Taglianetti* v. *United States*, 394 U.S. 316, 317, 89 S.Ct. 1099, 1100-1101, 22 L.Ed.2d 302, 304-305 (1969). Even if no appellant was the target of the surveillance as a whole, appellants maintain that once one of them has established his standing to claim taint from any conversation on his premises or to which he was a party, he is entitled to the tapes or transcripts of *all* conversations intercepted on that wiretap. Appellants thus contend that they can resist the use of any evidence obtained regardless, for instance, whether it was derived from a conversation of

Appellants sought records of eight of the 1970-73 wiretaps,[24] asserting that one or more appellants had been overheard on them. The District Court directed each appellant whose conversations allegedly had been intercepted to file an affidavit delineating the circumstances supporting the claim,[25] and only two undertook to do so.[26] Appellant James Lincoln averred:

> I have searched my recollection to the best of my ability and can state the following. Certain persons said to be targets of wire interceptions listed as numbers 4 and 8 above were known to me during the period in which the illegal taps were operative. I spoke with them during this period and spoke with them by telephone. Because of the lapse of time, I cannot now recollect the telephone numbers that were involved, and accordingly I am unable in good conscience to aver with certainty that I spoke to the individuals in question over the illegally tapped telephone numbers. On the basis of my memory, how-

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an appellant or from that of an unrelated speaker. *Alderman* and *Taglianetti*, however, clearly indicate that an accused is entitled only to the transcripts involving conversations which he has standing to attack and that he has standing to challenge only evidence obtained through his own conversations or those intercepted on his premises.

[24] Although appellants insist that the Landover and Seventh Street wiretaps were tainted by intelligence gained through the nine 1970-73 wiretaps, they sought tapes and transcripts only from eight, omitting a wiretap on the telephone of one of appellants, Albert Lincoln, presumably because information concerning it had already been made available to at least one appellant at the time that wiretap was declared unlawful.

[25] App. 428-429.

[26] The other appellants sought to rely solely upon the general nature of the 1970-73 wiretaps: "Each involved the FBI or local gambling investigators and each occurred in Washington, D.C. or its close environs." Brief for Appellants at 38.

ever, I have set forth above, I believe that possibility is a substantial one.[27]

Appellant Rosa L. Sumpter filed an almost identical affidavit, differing essentially only in its allegation that she might have spoken over wiretapped lines 1; 2, 3, 5, 6 and 7—those which Lincoln had not mentioned.[28] The Government, in turn, submitted letters from a responsible official of the Department of Justice stating that neither Lincoln nor Sumpter had been "monitored by any electronic device of the Federal Bureau of Investigation," [29] or of either of six other federal agencies.[30]

In light of the Government's positive denial, appellants failed to carry their threshold burden of demonstrating that any of their conversations were intercepted,[31] and they urge neither of the other two traditional grounds of entitlement to records of wiretapped communications for use at a taint hearing.[32] Rather, they insist that the tapes and transcripts of the 1970-73 electronic surveillance

[27] App. 285. He also stated, "I am aware that by firmly claiming to have spoken over the illegally tapped telephones, I can obtain access to their contents, which may materially benefit our contention that the current taps are unlawful. I understand the importance of such a claim, but in honesty can make it only as qualified above." App. 285-286.

[28] App. 287-290.

[29] App. 294-295; Transcript of June 19, 1975 Hearing (Tr.) 116; Brief for Appellee at 59.

[30] App. 295; Tr. 116; Brief for Appellee at 59.

[31] See *In re Evans*, *supra* note 22, 452 F.2d at 1247; *United States* v. *Covello*, 410 F.2d 536, 550 (2d Cir.), *cert. denied*, 396 U.S. 879, 90 S.Ct. 150, 24 L.Ed.2d 136 (1969); *United States* v. *D'Andrea*, 495 F.2d 1170, 1173 (3d Cir.), *cert. denied*, 419 U.S. 855, 95 S.Ct. 101, 42 L.Ed.2d 88 (1974); *United States* v. *Van Drunen*, 501 F.2d 1393, 1395 (7th Cir.), *cert. denied*, 419 U.S. 1091, 95 S.Ct. 684, 42 L.Ed.2d 88 (1974).

[32] See text *supra* at note 19.

must be provided to enable them to traverse the Government's denial. We disagree.

When the Government responds in the affirmative, the accused, as we have seen, may demand records only of monitoring of his own conversations, implicating his own premises or aimed at him.[33] Because the Government states flatly that none of the eight wiretaps in question here involved monitoring of conversations of those types, appellants necessarily are seeking an audit of all of the intercepted conversations, which according to their own count number in the thousands and cover a period of several years.[34] By that technique, individuals whose rights, according to the Government, have not been infringed would gain far greater access to evidence in the Government's possession than would an accused whose rights concededly were violated. Indeed, the curious logic of appellants' stance would require the Government, after the most unequivocal denial of an interception, routinely to bare the content of any wiretapped conversation to any accused who can claim that he just might have been overheard.

Appellants have pointed to no case wherein, despite a Government denial that electronic eavesdropping has af-

[33] See text at notes 19-20 *supra*. *United States* v. *Magaddino*, *supra* note 20, cited by appellants, is inapposite. There the Second Circuit divided wiretap challengers into three groups for purposes of determining their standing. The first group included those whose conversations the Government conceded it had overheard. 496 F.2d at 460. The second group consisted of those whose voices had been illegally intercepted by state officials. *Id.* The court held that both of these groups had standing. Those in the third group, however, had not shown that telephone conversations of their own had been intercepted, and the court held that they had failed to establish standing. At no time did it indicate that they were entitled to records of any conversations to aid their proof thereof.

[34] Brief for Appellants at 45.

fected an accused's protected interests, a court has ordered that records thereof be turned over to the accused to facilitate his proof of standing. On the contrary, it is well settled that an accused has "no right to rummage in Government files," [35] and that to "elicit[] what is in the Government's possession before its submission to the jury" he "must satisfy the trial court with [the] solidity" of his claim.[36] Put another way, "tenuous claims [are not] sufficient to justify the trial court's indulgence of inquiry into the legitimacy of evidence in the Government's possession." [37] We have, then, hewed to the view that the Government's denial must generally be accepted as conclusive,[38] and we do so again today.

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[35] *Taglianetti* v. *United States*, *supra* note 23, 394 U.S. at 317, 89 S.Ct. at 1100-1101, 22 L.Ed.2d at 304-305.

[36] *Nardone* v. *United States*, 308 U.S. 338, 342, 60 S.Ct. 266, 268, 84 L.Ed. 307, 312 (1939).

[37] *Id.*

[38] *In re Evans*, *supra* note 22, 146 U.S. App. D.C. at 318, 452 F.2d at 1247. Appellants argue that an electronic-surveillance denial by the Government not in affidavit form is insufficient to satisfy 18 U.S.C. § 3504 (1970). That provision, however, does not itself require an affidavit, although one is normally desirable. See Note, *Claiming Illegal Electronic Surveillance: An Examination of 18 U.S.C. § 3504(a)(1)*, 11 Harv. C.R. C.L. L. Rev. 632, 660 (1976). Only the Seventh Circuit has refused to accept letter-denials from the Assistant Attorney General in charge of the Justice Department's Criminal Division. See *United States* v. *Van Drunen*, *supra* note 31, 501 F.2d at 1399; *Korman* v. *United States*, 486 F.2d 926, 931 (7th Cir. 1973). We are not constrained, absent further enlightenment from Congress, to depart from the position taken by other circuits that have accepted letter-denials. See, *e.g.*, *United States* v. *Aloi*, 511 F.2d 585, 602 (2d Cir.), *cert. denied*, 423 U.S. 1015, 96 S.Ct. 447, 46 L.Ed.2d 386 (1975); *United States* v. *D'Andrea*, *supra*

Alderman v. *United States*,[39] does not, as appellants suggest, support their claim of access to the 1970-73 records. There the Supreme Court taught no more than that an accused is entitled to transcripts of his own conversations or those occurring on his own premises to assist the proof of his taint allegations.[40] Standing had been admitted in that case. *Alderman* in no way intimates that when the Government has unqualifiedly denied monitoring an accused it must then open up wiretapped conversations of various species to aid an individual in substantiating his standing. *Alderman* provided an adversary examination of unlawfully gathered tapes because determining "those items that might have made a substantial contribution to the [prosecution's] case" is a complex matter requiring judgment and knowledge that only the accused would have.[41] The factual determination

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note 31, 495 F.2d at 1174 n.12; *United States* v. *Stevens*, 510 F.2d 1101, 1104-1106 (5th Cir. 1975).

During the hearing, appellant Sumpter testified to several occurrences that in her mind pointed to an illegal wiretap on her telephone by an FBI agent at some earlier time. Tr. 114-125. The agent, however, testified to the contrary. Tr. 125-133. Since the agent's disavowal was under oath and he was available for cross-examination, we are not persuaded by appellant's complaint that the agent's denial was insufficient. *In re Maury Santiago*, 533 F.2d 727, 729-730 (1st Cir. 1976) (sworn testimony); *In re Berry*, 521 F.2d 179, 185 (10th Cir.), *cert. denied*, 423 U.S. 928, 96 S.Ct. 276, 46 L.Ed.2d 256 (1975) (unsworn oral denial). Nor can we characterize the court's finding that "Sumpter's testimony at the hearing was insufficient to show that the government had engaged in such interception" as clearly erroneous. App. 413 n.3.

[39] *Supra* note 18.

[40] 394 U.S. at 184, 89 S.Ct. 972, 22 L.Ed.2d at 193.

[41] *Id.* at 182, 89 S.Ct. at 971, 22 L.Ed.2d at 192:

> An apparently innocent phrase, a chance remark, a reference to what appears to be a neutral person or event,

summoned here, however, was neither subtle nor complicated, and thus ordinarily could be entrusted to the Government. Furthermore, the Court in *Alderman* recognized that required disclosure of tapped conversations might lead the Government to forgo prosecution in cases implicating third-party or national security interests,[42] and took pains to note that this prospect would be minimized because "disclosure [would] be limited to the transcripts of a defendant's own conversations and of those which took place on his own premises," and accordingly that "[i]t [could] safely be assumed that much of this he will already know." [43] In the instant case, however, disclosure could not be so limited and the problems avoided in *Alderman* would reappear full force.[44]

We leave open now, as we have done before, the question whether "under some circumstances [an individual] should be permitted to traverse the government's [denial], or whether [an individual] should be able to shift the burden of going forward back to the government by making some showing to contradict the government's assertions . . . ." [45] Appellants have made no such showing here. Only two of them even proffered particular

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the identity of a caller or the individual on the other end of a telephone, or even the manner of speaking or using words may have special significance to one who knows the more intimate facts of an accused's life. And yet that information may be wholly colorless and devoid of meaning to one less acquainted with all relevant circumstances.

[43] *Id.* at 184, 89 S.Ct. at 972, 22 L.Ed.2d at 193.

[44] *Id.* at 184-185, 89 S.Ct. at 972-973, 22 L.Ed.2d at 193.

[44] See text at note 33 *supra.*

[45] *In re Evans, supra* note 22, 146 U.S. App. D.C. at 318, 452 F.2d at 1247. We similarly leave open the question of *in camera* inspection where a substantial showing undercutting the Government's denial has been made.

allegations, and those—devoid of either dates, times or subject matter of the relevant conversations—fell far short of germinating a substantial suspicion that the Government's denial was untrustworthy.[46] We realize that few accused of crime will be honestly able to be more specific as to discussions allegedly held several years earlier. But the alternative of compelling the Government to disclose the contents of any wiretapped conversation in which an accused asserts that he just might have been overheard would place a burden on law enforcement that is both unprecedented and dangerous.[47] Since appellants are not entitled to the assistance they seek in establishing their standing, and since they have not otherwise demonstrated their standing to challenge any conjectured taint emanating from the 1970-73 intercepts, the District Court's determination in that regard must be sustained.[48]

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[46] See text at notes 27-28 *supra.* See also note 26 *supra.* At the close of oral argument before this court, counsel for appellants suggested for the first time that appellants needed access to the contents of the intercepted conversations to find out whether unidentified voices thereon included those of appellants. Compare *(Robert) Baker* v. *United States,* 131 U.S. App. D.C. 7, 33, 401 F.2d 958, 984 (1968), *on remand,* 301 F. Supp. 973 (D.D.C. 1969), *aff'd,* 139 U.S. App. D.C. 126, 430 F.2d 499, *cert. denied,* 400 U.S. 965, 91 S.Ct. 367, 27 L.Ed.2d 384 (1970) with *United States* v. *Covello, supra* note 31, 410 F.2d at 550 and *United States* v. *Kane,* 450 F.2d 77, 81 (5th Cir. 1971), *cert. denied,* 405 U.S. 920, 92 S.Ct. 367, 27 L.Ed.2d 384 (1972) and *Nolan* v. *United States, supra* note 21, 423 F.2d at 1042. This possibility was not urged in the District Court, and the record is devoid of any indication of the existence of unidentified voices on those wiretaps. Since the issue was not raised in the District Court nor briefed or argued to this court, we do not consider it.

[47] See text at notes 39-44 *supra.*

[48] Even assuming arguendo that all appellants have standing to challenge the wiretap of appellant Albert Lincoln's telephone—the transcripts of which were already in their posses-

III

Appellants further maintain that the applications for the Seventh Street and Landover wire interceptions failed to set forth adequately information called for by 18 U.S.C. § 2518(1)(c), which specifies that each such request include

> a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous.[49]

That section also imposes a corresponding duty on the authorizing judge to find, as a condition to granting an application, that "normal investigative procedures have been tried and have failed or reasonably appear to

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sion, see note 24 *supra*—they have not pointed to any taint from that wiretap. Unlike the records of the eight wiretaps to which the District Court denied them access, appellants could have used the Albert Lincoln transcripts to trace any possible taint to the Seventh Street and Landover wiretaps. Instead, aside from the general assertion that some information sources may have been developed through the use of the prior illegal wiretaps, appellants have based no argument specifically on the transcripts in their possession. No one would deny that "the trial judge must give opportunity, however closely confined, to the accused to prove that a substantial portion of the case against him was the fruit of the poisonous tree." *Nardone* v. *United States*, *supra* note 36, 308 U.S. at 341, 60 S.Ct. at 268, 84 L.Ed. at 312. But where, as here, parties come forward with no showing whatsoever that the Government has used intelligence derived from the earlier illegal wiretap, and where the FBI agent in charge of the investigation declares under oath that, to his knowledge, the FBI never had any contact with that wiretap, App. 379-381, all the opportunity that *Nardone* and *Alderman* provide has been afforded. See also *United States* v. *Sapere*, 531 F.2d 63, 66-67 (2d Cir. 1976).

[49] 18 U.S.C. § 2518(1)(c) (1970).

be unlikely to succeed if tried or too dangerous" before permitting any electronic surveillance.[50]

The purpose of these critical requirements is to insure that "wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime," [51] and that it is utilized only "where the circumstances warrant the serruptitious interception of wire and oral communications." [52] Because necessity is a keystone of congressional regulation of electronic eavesdropping,[53] courts have given close scrutiny to applications challenged for noncompliance [54] and have rejected generalized and conclusory statements that other investigative procedures would prove unsuccessful.[55] Nonethe-

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[50] 18 U.S.C. § 2518(3)(c) (1970).

[51] *United States* v. *Kahn*, 415 U.S. 143, 153 n.12, 94 S.Ct. 977, 983 n.12, 39 L.Ed.2d 225, 236 n.12 (1974).

[52] *United States* v. *Giordano*, 416 U.S. 505, 515, 94 S.Ct. 1820, 1826-1827, 40 L.Ed. 341, 373 (1974).

[53] Note, *Electronic Surveillance, Title III, and the Requirement of Necessity*, 2 Hast. Const. L. Q. 571, 617 (1975).

[54] *United States* v. *(Leon) James*, 161 U.S.App.D.C. 88, 95-97, 494 F.2d 1007, 1014-1016, *cert. denied*, 419 U.S. 1020, 95 S.Ct. 495, 42 L.Ed.2d 294 (1974); *United States* v. *Scibelli*, 549 F.2d 222, 227 (1st Cir. 1976), *cert. denied*, 431 U.S. 960, 97 S.Ct. 2687, 53 L.Ed.2d 278 (1977); *United States* v. *DiMuro*, 540 F.2d 503, 510-511 (1st Cir. 1976), *cert. denied*, 429 U.S. 1038, 97 S.Ct. 733, 50 L.Ed.2d 749 (1977); *United States* v. *Vento*, 533 F.2d 838, 849-850 (3d Cir. 1976); *United States* v. *Pacheco*, 489 F.2d 554, 565 (5th Cir. 1974), *cert. denied*, 421 U.S. 909, 95 S.Ct. 1558, 43 L.Ed.2d 774 (1975); *United States* v. *Kalustian*, 529 F.2d 585, 589-590 (9th Cir. 1975). Compare *United States* v. *Anderson*, 542 F.2d 428, 431 (7th Cir. 1976).

[55] *United States* v. *Scibelli*, *supra* note 54, 549 F.2d at 227-228; *United States* v. *DiMuro*, *supra* note 54, 540 F.2d at 510-511; *United States* v. *Vento*, *supra* note 54, 533 F.2d at 849-850; *United States* v. *Feldman*, 535 F.2d 1175, 1178-1179 (9th

less, the statutory command was not designed to "foreclose electronic surveillance until every other imaginable method of investigation has been unsuccessfully attempted." [56] Rather, "[i]t is sufficient that the government show that other techniques are impractical under the circumstances and that it would be unreasonable to require pursuit of those avenues of investigation"; [57] and, consistently with the congressional intent, that "showing [must] be tested in a practical and commonsense fashion." [58] Consequently, in practice "[c]ourts have interpreted this requirement flexibly, recognizing that wiretaps are neither a routine initial step nor an absolute last resort." [59]

Measured in this manner, the applications for the electronic interceptions at Seventh Street and Landover clear-

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Cir.), *cert. denied*, 429 U.S. 940, 97 S.Ct. 354, 50 L.Ed.2d 309 (1976); *United States* v. *Kalustian*, *supra* note 54, 529 F.2d at 589-590.

[56] *United States* v. *Robertson*, 504 F.2d 289, 293 (5th Cir. 1974), *cert. denied*, 421 U.S. 913, 95 S.Ct. 1568, 43 L.Ed.2d 778 (1975); accord, *United States* v. *Vento*, *supra* note 54, 533 F.2d at 849; *United States* v. *Pacheco*, *supra* note 54, 489 F.2d at 565; *United States* v. *Kerrigan*, 514 F.2d 35, 38 (9th Cir.), *cert. denied*, 423 U.S. 924, 96 S.Ct. 266, 46 L.Ed.2d 249 (1975).

[57] *United States* v. *Vento*, *supra* note 54, 533 F.2d at 849; accord, *United States* v. *James*, *supra* note 54, 161 U.S.App. D.C. at 98-99, 494 F.2d at 1015-1016; *United States* v. *Pacheco*, *supra* note 54, 489 F.2d at 565.

[58] S. Rep. No. 1097, 90th Cong., 2d Sess. 101 (1968); accord, *United States* v. *James*, *supra* note 54, 161 U.S.App.D.C. at 98-99, 494 F.2d at 1015-1016; *United States* v. *de la Fuente*, 548 F.2d 528, 537-538 (5th Cir.), *cert. denied*, 431 U.S. 932, 97 S.Ct. 2640, 53 L.Ed.2d 249 (1977).

[59] Note, *The United States Courts of Appeals: 1975-1976 Term Criminal Law and Procedure*, 65 Geo. L.J. 203, 247 (1976).

ly comply with the statute. The Seventh Street application and its accompanying affidavit describe the five-year investigation preceding the request.[60] The affidavit explains that while the FBI had received information from twelve reliable confidential sources—many of whom had obtained their information from appellants [61]—none of the informants was willing to testify because of fear for his safety.[62] The affidavit further states that the FBI had attempted to build its case by conducting over thirty visual surveillances of some appellants, and by installing a pen register on a telephone used by one appellant.[63] Although these techniques had uncovered a suspicious pattern of behavior suggesting that the Seventh Street house was a focal point of numbers activity, they did not produce evidence that could be used to prosecute many of the principals involved.[64] And the affidavit, in its summary, averred that

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[60] App. 50-132.

[61] See text at note 4 *supra*.

[62] App. 130; see *United States* v. *Agrusa*, 541 F.2d 690, 694 (8th Cir. 1976), *cert. denied*, 429 U.S. 1045, 97 S.Ct. 751, 50 L.Ed.2d 759 (1977). Neither the authorizing court nor the trial court was presented with any reason to disbelieve this representation. It has been suggested that "[f]ederal agents . . . routinely tell the courts that their confidential informants refuse to testify for fear of their lives, but in many cases where the informant is disclosed, he admits he had no such fear." Schwartz, *Taps, Bugs, and Fooling the People*, reprinted in Y. Kamisar, W. LaFave, & J. Israel, Modern Criminal Procedure 103 (1978 Supp.).

Should we encounter in future cases this or any other abuse of the confidence entrusted to officials making applications under Title III, we will not hesitate to attempt to craft a remedy.

[63] See note 5 *supra* and accompanying text.

[64] App. 130.

> [d]ue to the considerable length of time covered by this investigation using all possible normal investigative techniques, and through the experience of affiant and other Special Agents of the Federal Bureau of Investigation familiar with the investigation of numbers gambling operations, it is reasonably concluded [that] the continued use of normal investigative techniques would not bring this matter to a successful conclusion.[65]

The Landover application, which was made after completion of the Seventh Street interceptions, incorporates the earlier affidavit and similarly details reasons for the Government's belief that the target telephones were being used in a gambling operation.[66] The Landover affidavit also includes transcripts of calls intercepted on the Seventh Street line from the target telephones,[67] and a concluding section similar to that in the Seventh Street affidavit.[68]

Appellants argue that the summary and prayer portions of the affidavits contain mere boilerplate assertions, in derogation of the statutory command. To be sure, these sections of the affidavits are framed in conclusory terminology, but they cannot rationally be separated from the preceding detailed descriptions of the investigative events. Applications are not to be read in a piecemeal fashion,[69] and viewed as a whole the requests here delineated the reasons—which we deem ample—why other investigative techniques either had failed or would not

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[65] App. 130-131.

[66] App. 145-270.

[67] App. 210-235.

[68] App. 237-239.

[69] *United States* v. *Feldman, supra* note 55, 535 F.2d at 1179; *United States* v. *Robertson, supra* note 56, 504 F.2d at 293.

be feasible. The Government had conducted a multifaceted five-year investigation and still was unable to secure the evidence necessary to prosecute many of the principals of the gambling operation.[70] This, then, is not a situation in which the Government sought to employ wiretapping as a routine investigative tool;[71] neither is it a case in which the Government relied simply on "the insufficiency of alternative procedures in gambling prosecutions *in general* . . . ." [72] Instead, after scrutinizing the numbers activity over a long period of time by conventional techniques, the Government not unreasonably believed it needed to utilize electronic surveillance to gain enough intelligence about the "nature and the scope" of the operation.[73] In short, "exposure of [the] entire

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[70] See *United States* v. *Abramson, supra* note 21, 553 F.2d at 1171 (after seven months other techniques had failed to produce evidence sufficient for prosecution); *United States* v. *Spagnulo*, 549 F.2d 705, 710-711 (9th Cir. 1977) (affidavit properly included facts from which "a district judge [could] independently determine that ordinary investigative techniques employing a normal amount of resources have failed to make a case within a reasonable amount of time"); Note, *supra* note 53, 2 Hast. Const. L.Q. at 606-616 (discussing normal investigative techniques that must have failed or been too dangerous or ineffective).

[71] See *United States* v. *Kalustian, supra* note 54, 529 F.2d at 1179.

[72] *United States* v. *Feldman, supra* note 55, 535 F.2d at 1178 (emphasis in original). Compare *United States* v. *McCoy*, 539 F.2d 1050, 1055-1056 (5th Cir. 1976), *cert. denied*, 431 U.S. 919, 97 S.Ct. 2185, 53 L.Ed.2d 230 (1977).

[73] The applications for the wire interceptions stated that violations of 18 U.S.C. § 1955 (1970) were among the crimes to be investigated. That offense requires proof that a gambling business "involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business," and that it "has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day." 18 U.S.C.

operation required different and more sophisticated techniques." [74] The applications adequately set forth the basis for concluding that normal investigative procedures had been exhausted or would be unlikely to produce essential evidence, and the District Court correctly held that the statutory requirement had been satisfied.

IV

Having found that appellants failed to establish their standing to challenge any taint in the Seventh Street and Landover intercepts stemming from the prior unlawful wiretaps, and that the Seventh Street and Landover applications complied with governing law, appellants' convictions are hereby

Affirmed.

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§ 1955(b)(1)(ii) & (iii) (1970). When the Government is duly authorized to resort to electronic surveillance in a criminal investigation, it may do so—to the limit of its authority—to ascertain the full extent of the crime. *United States* v. *Vento*, *supra* note 54, 533 F.2d at 850; *United States* v. *Robertson*, *supra* note 56, 504 F.2d at 293; *United States* v. *Pacheco*, *supra* note 54, 489 F.2d at 565; *United States* v. *Armocida*, 515 F.2d 29, 38 (3d Cir.), *cert. denied*, 423 U.S. 858, 96 S.Ct. 111, 46 L.Ed.2d 84 (1975). These considerations combine to make apparent why, despite the five-year investigation, wiretapping was necessary to any effort to ascertain whether appellants were in violation of § 1955.

[74] *United States* v. *James*, *supra* note 54, 161 U.S.App.D.C. at 97, 494 F.2d at 1016; see *United States* v. *Sandoval*, 550 F.2d 427, 430-431 (9th Cir. 1976).